## WONG ING TONG v. YAP PIAT ENG & ANOR AND OTHER APPEALS

COURT OF APPEAL, PUTRAJAYA
HAS ZANAH MEHAT JCA
HADHARIAH SYED ISMAIL JCA
MOHD SOFIAN ABD RAZAK JCA
[CIVIL APPEAL NOS: W-01(NCVC)(W)-104-02-2020,
W-01(NCVC)(W)-144-03-2020
& W-01(NCVC)(W)-145-03-2020]
18 FEBRUARY 2022

**Abstract** – *Forgery of documents in a sale of land is, by itself, sufficient in making a registered title defeasible even though the proprietor or the transferee is not a party to the forgery. This would, in turn, affect an immediate purchaser even if he is an innocent purchaser for value.*

***LAND LAW:*** *Title – Indefeasibility – Fraudulent transfer of lands – Forgery – Disputed documents purportedly executed between registered proprietors and fraudster – Registered proprietors had not seen nor signed documents – Whether fraud or dishonesty established – Whether forgery established – Whether registered proprietors remained true owners of lands – Whether registered proprietors held indefeasible title – National Land Code, s. 340(2)(b)*

***LAND LAW:*** *Fraud – Transfer – Fraudulent transfer of lands through forged documents – Registered proprietors had not seen nor signed documents – Whether fraudster bona fide immediate purchaser – Whether fraud or dishonesty established – Whether forgery established – Whether forgery by itself sufficient in making registered title defeasible even though proprietors/transferees not party to forgery – National Land Code, s. 340(2)(b)*

***LAND LAW:*** *Charge – Bank – Land titles fraudulently acquired charged to bank – Whether bank carried out investigation and took precautions to find out more about land before granting loan to fraudster – Whether bank acted in good faith*

The present appeals involved competing claims between the proprietors of lands and the purported purchaser over two lands ('properties'). The first property was registered under the name of one Madame Yap ('first plaintiff') while the second property was registered under Hoyen Enterprise Sdn Bhd ('second plaintiff'), a company in which the first plaintiff and her husband were the directors and shareholders. In 2014, the first plaintiff appointed one Yap Kok Sheng ('first defendant'), a solicitor, to transfer her husband's half share in the first property and, for that purpose, handed to first defendant the issue document of title. The first defendant later returned the issue document of title for the first property. The first plaintiff was then informed by her

A tenants that the second defendant, who claimed to be the owner of the properties, told the tenants that they had to make rental payments to the second defendant, or they would have to vacate the properties. Upon hearing this, the plaintiffs conducted a private land search on the properties and learned about the transfer of the properties to the second defendant. The B documents purportedly executed between the plaintiffs and the second defendant, in relation to the sale and transfer of the properties revealed, *inter alia*, that the properties were transferred to the second defendant in 2016 where the plaintiffs were represented by the first defendant while the second defendant was represented by the third defendant. The plaintiffs lodged C private caveats on the properties, but these caveats were withdrawn by the second defendant. The removal of the caveat facilitated the entry of charge by the second defendant to Malayan Banking Bhd ('sixth defendant') on the respective properties. The second defendant had intended to sell the properties to one Cheah Teow Meing ('seventh defendant') and the latter lodged a private caveat on the properties. The plaintiffs commenced an D action against the defendant, at the High Court, to restore the properties back to the plaintiffs and for damages. The plaintiffs alleged that (i) the transfers and the charges could not have been effected without the fraudulent conduct of the defendants; and (ii) the third defendant was negligent while the Director of Lands and Mines Selangor ('fifth defendant') was in breach of his E statutory duty. The High Court Judge ('HCJ') held that, *inter alia,* (i) the transfer of the properties to the second defendant were obtained by forgery, rendering the titles defeasible; (ii) the plaintiffs failed to prove fraud against the second to fifth defendants; (iii) the third and fourth defendants did not owe any duty of care to the plaintiffs; (iv) the plaintiffs failed to prove fraud, F negligence and breach of statutory duty against the fifth defendant; and (v) the sixth defendant was not a purchaser in good faith within the meaning of the proviso in s. 340(3) of the NLC by reason of it having notice of the caveats and, consequently, the charges created in favour of the sixth defendant were void. Allowing the plaintiffs' claim, the High Court (i) set G aside the transfer and registration of the second defendant's name as the registered proprietor of the properties; (ii) cancelled the charges in favour of the sixth defendant; and (iii) awarded damages to the plaintiffs. Hence, the present appeals by the plaintiffs and the second and sixth defendants.

**Held (dismissing appeals):**

H **Per Hadhariah Syed Ismail JCA delivering the judgment of the court:**

**(1)** The second defendant could not deny that there were many disputed documents purportedly executed between him and the plaintiffs which the plaintiffs had not seen nor signed. When forgeries were alleged by the plaintiffs, surely, the dispute could not be resolved by merely I accepting the second defendant's contention that he was a *bona fide*

purchaser who had paid the full purchase price. To accede to the second defendant's argument, that in the absence of fraud or dishonesty on his part, the plaintiffs' claim must fail, would cause serious miscarriage of justice to the plaintiffs. Therefore, in fairness to all parties, the HCJ had to consider the whole circumstances of the case. Furthermore, the courts have recognised that s. 340(2)(b) of the National Land Code ('NLC') is a specific provision which expressly states that forgery, by itself, suffices in making a registered title defeasible even though the proprietor or the transferee was not a party to the forgery. It would affect the immediate purchaser even if he is an innocent purchaser for value. In the circumstances, the HCJ had not erred in law or in fact in His Lordship's finding of forgery and in invoking s. 340(2)(b) of the NLC. (paras 33 & 34)

**(2)** As the true owners of the properties, surely the plaintiffs had in their possession the original titles. With the High Court's finding that the plaintiffs did not sell the properties, it was only logical to say that the plaintiffs remained the true owners of the properties. Even if the second defendant had genuine titles, it did not change the fact that the transfer of the properties never took place. Furthermore, the law in s. 340(2)(b) of the NLC did not operate in favour of the second defendant. The second defendant, an immediate purchaser of a title tainted with forgery, acquired a title that was not indefeasible under s. 340(2)(b) of the NLC. The *bona fide* of the immediate purchaser was not a shield of indefeasibility. The title obtained by the immediate purchaser was liable to be set aside once the vitiating elements under s. 340(2)(b) were proven. (paras 37 & 38)

**(3)** The plaintiffs did not know and had no dealing with the second to fifth defendants. It would be impossible for the plaintiffs to adduce evidence to prove fraud against the second to fifth defendants. The plaintiffs could only testify on the documents, namely that their signatures were forged. As for the negligence alleged against the third defendant, although the HCJ found that the third defendant was reckless, no duty of care was owed to the plaintiffs as there was no solicitor-client relationship between the third defendant and the plaintiffs. There was no good reason to disturb the finding of fact made by the HCJ. In the absence of any explanation by the HCJ as to why His Lordship only allowed the sums of RM288,000 and RM161,000 for the respective properties, the court was not in the position to say the awards were erroneous. This was also not a suitable case to award exemplary damages as there was no clear evidence as to whose conduct amongst the defendants that could be calculated to make a profit for himself which may well exceed the compensation payable to the plaintiffs. (paras 49 & 50)

**(4)** By reason of the titles acquired by the second defendant were defeasible under s. 340(2)(b) of the NLC, the charges created in favour of the sixth defendant were also defeasible unless the sixth defendant could prove it had acquired its interest in the properties *ie*, the charges, in good faith and for valuable consideration under the proviso of s. 340(3) of the NLC. A reasonable prudent purchaser in the sixth defendant's position would investigate as to what, why and how the plaintiffs had alleged there was a fraud. Surely, the sixth defendant ought to take precautions to find out the truth of the matter before deciding to grant a loan to the second defendant. If the sixth defendant conducted an investigation, it would discover that the documentary evidence relied upon by the sixth defendant to effect the transfer of the properties were tainted with forgeries. Despite having actual knowledge of the dispute of ownership and the allegation of fraud, the sixth defendant treated the caveats as insignificant and had them removed. The sixth defendant then proceeded to grant a loan to the second defendant and created the charges. Therefore, the sixth defendant had not acted reasonably and fairly. The sixth defendant's conduct excluded good faith. (paras 53 & 66)

**Case(s) referred to:**

*Au Meng Nam & Anor v. Ung Yak Chew & Ors [2007] 4 CLJ 526 CA* ***(refd)***

*Kamarulzaman Omar & Ors v. Yakub Husin & Ors [2014] 1 CLJ 987 FC* ***(refd)***

*Rabiah Lip & Ors v. Bukit Lenang Development Sdn Bhd & Other Appeals [2008] 3 CLJ 692 CA* ***(refd)***

*Sia Hiong Tee & Ors v. Chong Su Kong & Ors [2015] 8 CLJ 1173 FC* ***(refd)***

*T Sivam Tharamalingam v. Public Bank Bhd [2018] 6 CLJ 1 FC* ***(refd)***

**Legislation referred to:**

National Land Code, s. 340(2)(b), (3)

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*For the appellant/2nd defendant - R Rajasurian, Vasudevan Appu & Ramesh Lachmanan, Mohd Irfan Mohd Asrad; M/s Vasudevan A & Rodwan Chambers*

*For the 3rd & 4th respondents/3rd & 4th defendants - Leong Wai Hong, Witter Yee, Cedric Chan Yew; M/s Skrine*

*For the 5th respondent/5th defendant - Nurimawatie Daud, Maizatul Munirah Abdul Rahman & Amirah Haziwah Zulkifir; Penolong Penasihat Undang-undang*

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*[Editor's note: For the High Court judgment, please see Yap Piat Eng & Anor v. Yap Kok Sheng & Ors [2020] 1 LNS 618 (affirmed).]*

*Reported by Najib Tamby*

## JUDGMENT

**Hadhariah Syed Ismail JCA:**

**Introduction**

**[1]** The subject matter of dispute in these three appeals involves competing claims between the innocent proprietors of the lands and the purported purchaser over the following two properties:

(i) a land held under HS(D) 33355, PT 21039, Mukim Cheras, Selangor together with a 3 1/2 storey building erected thereon bearing the address No. 41, Jalan SL 1/4, Bandar Sg Long, 43200 Cheras, Selangor (first property); and

(ii) a land held under HS(D) 33356, Mukim Cheras, Selangor together with a 3 1/2 storey building erected thereon bearing the address No. 39, Jalan SL 1/4, Bandar Sg Long, 43200 Cheras, Selangor (second property).

(hereinafter referred to as "the properties").

**[2]** Yap Piat Eng @ Yap Lien Eng (the first plaintiff) was the registered proprietor of the first property since 1995. The second plaintiff, Hoyen Enterprise Sdn Bhd was the registered proprietor of the second property since 1996.

**[3]** The second plaintiff is a company in which the first plaintiff and her husband, one Chong Wai Onn are the directors and shareholders. Chong Wai Onn owns 95% of the shares in the second plaintiff.

**[4]** The properties are adjacent shop lots and are occupied by tenants.

**[5]** Without the plaintiffs' knowledge and consent, the properties were transferred and registered in Wong Ing Tong's name (the second defendant).

**[6]** Thereafter, the second defendant charged the properties to Malayan Banking Berhad (the sixth defendant).

**[7]** The plaintiffs claim that they did not sell the properties to the second defendant. They brought this action to set aside the transfer of the properties to the second defendant and to cancel the charges in favour of the sixth defendant.

**[8]** On 31 December 2019, the High Court allowed the plaintiffs' claim. The court set aside the transfer and registration of the second defendant's name as the registered proprietor of the properties; cancelled the charges in favour of the sixth defendant and awarded damages to the plaintiffs.

**[9]** Dissatisfied with the High Court's decision, the plaintiffs (Appeal No. 144), the second defendant (Appeal No. 104) and the sixth defendant (Appeal No. 145) appealed to this court.

**[10]** We heard the three appeals together on 1 October 2021 and adjourned for decision to 9 November 2021. On 9 November 2021, we unanimously dismissed all three appeals with no order as to costs.

**[11]** This is our judgment. In this judgment, we will refer the parties as they were in the High Court.

A **Background Fact**

**[12]** Sometime in March 2014, the first plaintiff (Madam Yap) appointed one Yap Kok Sheng (YKS) to transfer her husband's half share in the first property to her name. YKS is a lawyer practising in the legal firm of M/s Sheng Lee Law Office (the first defendant). For that purpose, Madam B Yap handed the issue document of title for the first property to YKS. Madam Yap claims the issue document of title for the first property was returned to her by the first defendant.

**[13]** On 20 September 2016, Madam Yap was informed by her tenants that they were disturbed by the second defendant and/or his agent who claimed C that the tenants had to make payments of rental to the second defendant directly or the tenants would have to vacate the properties on the basis the second defendant was the owner of the properties. The tenants also received a notice of demand from the second defendant's lawyer, M/s Michael Chen & Co.

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**[14]** Upon hearing this, the plaintiffs instructed their new solicitors, M/s Norendra & Yap to conduct a private land search on the properties. It was only on or about 29 September 2016 that the plaintiffs discovered for the first time about the transfer of the properties to the second defendant as E well as the documents purportedly executed between the plaintiffs and the second defendant in relation to the sale and transfer of the properties to the second defendant.

**[15]** Amongst the documents purportedly executed between the plaintiffs and the second defendant are the sale and purchase agreement dated 30 March 2016 for the respective property; powers of attorney dated 1 April F 2016 and Form 14A dated 18 July 2016 for the respective property; (hereinafter referred to as "the disputed documents").

**[16]** The disputed documents revealed the following facts:

G (i) that the first property was transferred to the second defendant on 2 September 2016;

(ii) that the second property was transferred to the second defendant on 8 August 2016;

(iii) that in the sale and purchase transaction of the properties, the solicitors H purportedly representing the plaintiffs were the first defendant (YKS) and the solicitors representing the second defendant was the third defendant.

(iv) that the purported purchase price for the first and second properties were RM1,500,000 and RM850,000 respectively;

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(v) that the second defendant had purportedly paid the full purchase price of the properties to the first defendant.

**[17]** Thereafter, the plaintiffs lodged a private caveat on the properties on 4 October 2016 (the first caveat). The first caveat was withdrawn by the second defendant who purportedly acted under the power of attorney granted to him for the properties.

**[18]** The removal of the first caveat facilitates the entry of charge by the second defendant to the sixth defendant on the respective property on 25 November 2016.

**[19]** The second defendant also intended to sell the properties to one Cheah Teow Meng (the seventh defendant) *vide* an agreement to sell dated 11 November 2016. A private caveat was entered by the seventh defendant on the properties on 8 December 2016, but the sales did not go through.

**[20]** Having sighted the disputed documents, the plaintiffs maintain their position that:

(i) they hold the original issue document of title for the respective property;

(ii) they did not appoint nor instruct YKS to sell the properties;

(iii) they had never instructed YKS or the third defendant to prepare and execute the disputed documents;

(iv) they did not sign the disputed documents;

(v) they had never met the second defendant; and

(vi) they did not receive any payment from the second defendant directly or otherwise.

**[21]** On 14 March 2017, the plaintiffs commenced this action against the defendants to restore the properties back to the plaintiffs and for damages for the losses they had suffered. The plaintiffs alleged that the transfers and the charges could not have been effected without the fraudulent conduct involving the defendants. In addition to fraud, the plaintiffs also alleged negligence against the third defendant and breach of statutory duty against the fifth defendant.

## The High Court Decision

**[22]** Upon considering the facts and the law, the High Court made the following orders:

(i) Judgment be entered against the first defendant for a sum of RM228,000 being loss of rental in respect of the first property and a sum of RM161,000 being loss of rental in respect of the second property and costs to the plaintiffs.

A (ii) In respect of the claim against the second defendant and the sixth defendant:

(a) a declaration that the first plaintiff is the legitimate registered proprietor and beneficial owner of the first property;

B (b) a declaration that the second plaintiff is the legitimate registered proprietor and beneficial owner of the second property;

(c) a declaration that the transfer of the properties to the second defendant is null and void and an order that the transfer be set aside and the second defendant is to be removed as the registered C proprietor of the properties;

(d) a declaration that the charges created in favour of the sixth defendant are null and void and an order that they be set aside and cancelled;

(e) order that the Registrar of Titles do all that is necessary:

D (1) to cancel the transfer of the properties to the second defendant;

(2) to cancel the charges created in favour of the sixth defendant;

(3) to issue to the first plaintiff an issue document of title to the first property in the first plaintiffs' name as the registered proprietor E of the first property;

(4) to issue to the second plaintiff an issue document of title to the second property in the second plaintiffs' name as the registered proprietor of the second property; and

F (5) to rectify the register document of title accordingly.

(f) costs in favour of the plaintiffs against the sixth defendant.

(g) no order as to costs in respect of the plaintiffs' claim against the second defendant.

G (iii) The action against the third, fourth and fifth defendants was dismissed with costs against the plaintiffs.

(iv) The action against the seventh defendant was dismissed with no order as to costs.

(v) Parties to have liberty to apply.

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**Appeal No. 104**

**[23]** In this appeal, the appellant (second defendant) raised two issues as follows:

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(i) the learned High Court Judge had erred in concluding that the transfer of the properties to the second defendant was obtained by forgery; and

(ii) the learned High Court Judge had erred in holding the second defendant's titles are defeasible.

**[24]** On the forgery issue, learned counsel for the second defendant submitted that having found the plaintiffs have failed to prove fraud against the second defendant, the learned High Court Judge (HCJ) had erred in making a finding of forgery when forgery was pleaded as part of the fraud. It was submitted that the learned HCJ had failed to consider: (i) that there was no evidence of dishonesty on the part of the second defendant; (ii) that the second defendant has paid the full purchase price of the properties; and (iii) the transactions were handled by the second defendant's solicitors and the first defendant who represented himself as the plaintiffs' solicitors.

**[25]** In response, learned counsel for the plaintiffs submitted that the learned HCJ's finding of forgery was a finding of fact which was supported by the evidence of the witnesses.

**[26]** Upon perusal of the appeal records and the grounds of judgment of the learned HCJ, we agree with learned counsel for the plaintiffs' submission. In this case, both the plaintiffs' witnesses have testified that they have not seen nor signed the disputed documents. They also said their purported signatures on the disputed documents were not their signature and were forged.

**[27]** We find the plaintiffs' evidence on forgery were supported by the evidence of the plaintiffs' handwriting expert, PW6 who testified that the plaintiffs' purported signatures on the disputed documents were from different authorship.

**[28]** Further evidence in support of forgery came from three other witnesses as follows:

(i) Miss Yeo Kheng Gee (PW3) is the company secretary of the second plaintiff. PW3 testified that she did not sign on the certified true copy of the director and member resolutions.

In her testimony, she said the signatures were not her signatures and were forged. She further said the rubber stamp appearing on the purported resolutions was also forged.

Her evidence was accepted by the High Court.

(ii) Mr Lim Chau Yean (PW4) is an advocate and solicitor practising in Messrs Sheng Lee Law Office (legal firm). He left the legal firm in 2013. He gave evidence that he did not witness the first plaintiff signing the sale and purchase agreement dated 23 April 2015 and the Form 14A in

A relation thereto. He further said that the signature appearing on those two documents was not his signature and was forged. To protect himself, he lodged a police report. His evidence was accepted by the High Court.

(iii) The third defendant, Miss Yu Ai Ting (DW4) is an advocate and solicitor practising in M/s Y.S Lim & Ng. DW4 was the solicitor who
B acted for the second defendant in the sale and purchase transactions. DW4 admitted that she had signed as having witnessed or seeing the first plaintiff signed on the Form 14A dated 18 July 2016 as "instructed by Yap Kok Sheng (YKS)". In actual fact, she admitted that she did not actually witness the first plaintiff signing the said Form 14A. Her
C admission supports the first plaintiff's assertion that she had not seen nor signed the purported Form 14A. DW4's admission was accepted by the High Court.

**[29]** It is pertinent to note that the learned HCJ had also made a finding of fact that none of the defendants' witnesses had testified that they had met the
D first plaintiff and her husband. Instead, the second defendant and the third defendant deal directly with the first defendant only.

**[30]** In light of the above evidence, we agree with the finding of fact made by the learned HCJ at paras. [224], [234], [269] and [281] of His Lordship's judgment which states as follows:
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> [224] The testimonies of PW4, the 3rd defendant and PW3 were, in my view, indicative of some impropriety that was afoot relating to the dealings with the properties.
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F [234] Clearly PW6's opinion cannot *per se* be conclusive. However, even if his opinion is unreliable by reason of the lack of sufficient specimen signatures to compare with, this does not mean it was therefore proven that the 1st plaintiff and Chong Wai Onn did sign the disputed documents.
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> [269] ... on a balance of probabilities, I find that neither the 1st plaintiff or Chong Wai Onn signed on any of the disputed documents relating to the sale and transfer of the properties, including the Powers of Attorney.
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H [281] Having found that the plaintiffs did not sign any of the documents relating to the sale and transfer of their respective properties to the 2nd defendant, it would follow that the registration of the 2nd defendant as proprietor of the properties was obtained by forgery, or in any event, by means of insufficient or void instruments.

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**[31]** At the High Court, the second defendant had contended that the plaintiffs' pleaded case was fraud. Therefore, it was submitted that the plaintiffs cannot rely on s. 340(2)(b) of the National Land Code (NLC) which provides as follows:

> 340(2)The title or interest of any such person or body shall not be indefeasible:
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> (a) in any case of fraud or misrepresentation to which the person or body, was a party or privy; or
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> (b) where registration was obtained by forgery, or by means of an insufficient or void instrument; or
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> (c) where the title or interest was unlawfully acquired by the person or body in the purported exercise of any power or authority conferred by any written law.

**[32]** In response, learned counsel for the plaintiffs argued that the entire pleaded case of the plaintiffs rested on the contention that they never executed any of the documents relating to the sale and transfer of the properties. Having proven their signatures were forgeries, as a matter of law, the plaintiffs can invoke s. 340(2)(b) of the NLC to set aside the registration of the second defendant as the registered proprietor of the properties.

**[33]** We agree with the plaintiffs' contention that the plaintiffs' pleaded case is not limited to fraud only. The second defendant cannot deny that there are many disputed documents purportedly executed between him and the plaintiffs which the plaintiffs said they have not seen nor signed. When forgeries were alleged by the plaintiffs, surely, the dispute cannot be resolved by merely accepting the second defendant's contention that he was a *bona fide* purchaser who had paid the full purchase price. To accede to the second defendant's argument that in the absence of fraud or dishonesty on his part, the plaintiffs' claim must fail would cause serious miscarriage of justice to the plaintiffs. Therefore, in fairness to all parties, the learned HCJ had to consider the whole circumstances of the case.

**[34]** Our courts had recognised that s. 340(2)(b) of the NLC is a specific provision which expressly stated forgery by itself is sufficient in making a registered title defeasible even though the proprietor or the transferee is not a party to the forgery. It affects the immediate purchaser even if he was an innocent purchaser for value (*Sia Hiong Tee & Ors v. Chong Su Kong & Ors* [2015] 8 CLJ 1173; [2015] 4 MLJ 188 at p. 200). In the circumstances of this case, our view is the learned HCJ had not erred in law or in fact in his finding of forgery and in invoking s. 340(2)(b) of the NLC.

**[35]** We now turn to the second issue. Learned counsel for the defendant submitted that the learned HCJ had erred in holding the second defendant's title to the properties was defeasible. It is submitted that the learned HCJ had failed to consider: (i) there was no evidence of a replacement title for the properties had ever been issued to the second defendant; and (ii) the fact that the registration of the transfer of the properties had been approved by the land office shows the issue document of title submitted were genuine. In simple words, the second defendant says he obtained an indefeasible title because the transfer was effected with a genuine issue document of title.

**[36]** At the High Court, both the plaintiffs and the second defendant claimed they each had in their possession a genuine issue document of title for the properties. The plaintiffs have produced their titles, marked as exhs. P11 and P12, respectively. With regard to the issue of the genuineness of the titles, this is what the learned HCJ had to say:

> [249] In my view, it was never established as a fact that the issue documents of title in respect of the properties presented in evidence at the trial by the plaintiffs were other than what the plaintiffs were originally issued with by the Land Office in respect of their respective properties.
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> [250] More importantly and more relevant to the case at hand, was whether the plaintiffs actually entered into any agreement to sell and transfer the properties to the 2nd defendant and not whether the issue documents of title they have in their possession were genuine or authentic.
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> [251] It may be that the issue documents of title in their possession were fake copies of the genuine ones. They may have been given fake issue documents of title as part of a fraud.
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> [252] If the plaintiffs never contracted to sell and transfer the properties to the 2nd defendant, and the plaintiffs were at all material times prior to the transfer the true registered owners of the properties, the 2nd defendant would have no legal right to the properties being registered in his name or to deal with them.

**[37]** We fully agree with the approach adopted by the learned HCJ. As the true owners of the properties prior to this case, surely the plaintiffs had in their possession the original titles. With the High Court's finding that the plaintiffs did not sell the properties, it is only logical to say the plaintiffs remain the true owners of the properties. Therefore, even assuming it is true that the second defendant had a genuine title, it does not change the fact that the transfer of the properties never takes place.

**[38]** Furthermore, the law in s. 340(2)(b) of the NLC does not operate in favour of the second defendant. It is without a doubt that the second defendant is an immediate purchaser of a title tainted with forgery acquires a title that is not indefeasible under s. 340(2)(b). The *bona fide* of the immediate purchaser is not a shield of indefeasibility. The title obtained by

the immediate purchaser is liable to be set aside once the vitiating elements under s. 340(2)(b) is proven; see Federal Court case of *Kamarulzaman Omar & Ors v. Yakub Husin & Ors* [2014] 1 CLJ 987; [2014] 2 MLJ 768. Therefore, the learned HCJ did not err in holding the second defendant's titles are defeasible.

**[39]** For the aforesaid reasons, we find there is no appealable error to warrant appellate intervention. The decision of the High Court is not plainly wrong. Therefore, we dismissed the appeal.

**Appeal No. 144**

**[40]** The appeal by the plaintiffs is against the finding of the learned HCJ that:

(i) the plaintiffs have failed to prove fraud against the second to fifth defendants;

(ii) the third and fourth defendants owed no duty of care to the plaintiffs; and

(iii) the plaintiffs have failed to prove fraud, negligence and breach of statutory duty against the fifth defendant.

**[41]** The issues raised by the plaintiffs are as follows:

(i) the learned HCJ had failed to consider that the entire fraudulent transactions could not have happened if not because of the fraud orchestrated by the second defendant to the fifth defendant.

(ii) the learned HCJ had failed to hold the third and fourth defendants were negligent; had assumed a duty of care to the plaintiffs and had breached the duty of care which amounts to fraud.

(iii) the learned HCJ only awarded RM161,000 against the first defendant as the loss of rental of the second property, less than RM212,820 claimed by plaintiffs; and

(iv) the learned HCJ had failed to award exemplary damages to the plaintiffs.

**[42]** The particulars of fraud alleged against the second defendant are pleaded in paras. 48 and 48A of the amended statement of claim. Among them were that the second defendant was involved in procuring or causing the issue of forged copies of the issue documents of title in respect of the properties, instructing or causing to be prepared the disputed documents relating to the sale and transfer of the properties, withdrawing the plaintiffs' caveats without the knowledge of the plaintiffs and entering into a sham sale and purchase agreement with the seventh defendant. The learned HCJ refers to these allegations of fraud as "a blunderbuss of allegations".

**[43]** With regard to the plaintiffs' allegations of fraud against the second defendant, the learned HCJ found there was no evidence of any fraud against the second defendant. His Lordship also found there was no evidence that the second defendant had conspired with anyone to fraudulently transferred the properties to himself. Instead, the learned HCJ ruled that the second defendant's purchase of the properties was done through his lawyers, the third and fourth defendants.

**[44]** The particulars of fraud alleged against the third and fourth defendants are pleaded in para. 49 of the amended statement of claim. Among them were the third and fourth defendants who were involved in executing or caused to be executed the sale and purchase agreements, powers of attorney and Form 14A; withdrawal of the plaintiffs' caveat without the plaintiffs' knowledge and failure to investigate the authenticity of the witness of the first plaintiff's signature by Lim Chau Yean (PW4) from Sheng Lee Law Office where PW4 ceased practising in Sheng Lee Law Office since 2013.

**[45]** The learned HCJ found there was no evidence led by the plaintiffs of any actual fraud on the part of the third and fourth defendants. In fact, when the first plaintiff was cross-examined by learned counsel for the third and fourth defendants as to whether she had any evidence to support the allegations of fraud against the third and fourth defendants, the first plaintiff says she does not know the third and fourth defendants and she had no evidence against them.

**[46]** As against the fifth defendant, the plaintiffs' allegation of fraud, among others, are failure to ensure that only one original issue document of title exist; to ensure that the system of registration or the records were correct and up to date; accepting the Forms 14A and the forged issue documents of title for the purposes of the transfers when they were not valid and failure to conduct an investigation. Against these allegations, the learned HCJ makes the following finding of facts:

(i) the fifth defendant had found the documents presented for the transfer of titles to the properties in conformity;

(ii) there was no evidence of any fault or failure on the part of the fifth defendant; and

(iii) none of the allegations of fraud, negligence or breach of statutory duty were made out against the fifth defendant.

**[47]** In relation to the plaintiffs' claim in negligence against the third and fourth defendants, the learned HCJ ruled that the transactions, in this case, were done between the solicitors for the vendors and solicitors for the purchaser. That there was no direct dealing between the third and fourth defendants with the plaintiffs. That the whole problem arose as a result of the third defendant's reliance on the first defendant's representations and not

the plaintiffs' reliance on the third defendant's representation if ever made. In the circumstances of the case, the learned HCJ held that the third and fourth defendants owed no duty of care to the plaintiffs.

**[48]** We agree with the finding of facts made by the learned HCJ on the issue of fraud and negligence against the second to fifth defendants. The truth is the plaintiffs do not know and had no dealing with the second to fifth defendants. It would be impossible for the plaintiffs to adduce evidence to prove fraud against the second to fifth defendants. The plaintiffs can only testify on the impugned documents, namely their signatures were forged. As for the negligence alleged against the third defendant, although the learned HCJ found the third defendant was reckless, no duty of care is owed to the plaintiffs as there was no solicitor-client relationship between the third defendant and the plaintiffs. We see no good reason to disturb the finding of fact made by the learned HCJ.

**[49]** In relation to the award of loss of rental in the sum of RM288,000 for the first property and RM161,000 for the second property, the plaintiffs' complaint is the learned HCJ did not grant any award for the loss suffered by the plaintiffs up until the properties were recovered from the second defendant. In the absence of any explanation by the learned HCJ as to why His Lordship only allows the sums of RM288,000 and RM161,000 for the respective property, we are not in a position to say the award is erroneous.

**[50]** With regard to the plaintiffs' claim for exemplary damages, we agree with the learned HCJ that this is not a suitable case to award exemplary damages as there was no clear evidence as to whose conduct amongst the defendants that can be calculated to make a profit for himself which may well exceed the compensation payable to the plaintiffs.

**[51]** For the aforesaid reasons, we find there is no merit in this appeal. The appeal is, therefore dismissed. The decision of the High Court is affirmed.

**Appeal No. 145**

**[52]** The appeal by the sixth defendant (Maybank) is against the decision of the High Court which held that Maybank was not a purchaser in good faith within the meaning of the proviso in s. 340(3) of the NLC by reason of it having notice of the caveats and consequently, the charges created in favour of Maybank were void and set aside.

**[53]** By reason of the titles acquired by the second defendant were defeasible under s. 340(2)(b), the charges created in favour of Maybank were also defeasible unless Maybank can prove it had acquired its interest in the properties *ie*, the charges, in good faith and for valuable consideration under the proviso of s. 340(3) which reads as follows:

340(3) Where the title or interest of any person or body is defeasible by reason of any of the circumstances specified in subsection (2):

(a) it shall be liable to be set aside in the hands of any person or body to whom it may subsequently be transferred; and

(b) any interest subsequently granted thereout shall be liable to be set aside in the hands of any person or body in whom it is for the time being vested;

Provided that nothing in this sub-section shall affect any title or interest acquired by any purchaser in good faith and for valuable consideration, or by any person or body claiming through or under such a purchaser.

**[54]** The word "good faith" has no exhaustive meaning. Generally, good faith is understood to mean honesty or sincerity of intention. The common features to look for in determining a purchaser of good faith are as follows:

(i) Good faith does not simply mean an absence of fraud, deceit or dishonesty. It also requires acting honestly, reasonably and fairly; (*T Sivam Tharamalingam v. Public Bank Bhd* [2018] 6 CLJ 1; [2018] 5 MLJ 711).

(ii) Knowledge of a dispute as to the ownership of property and knowledge of fraud allegation vitiate good faith; (*T Sivam*'s case).

(iii) Elements of carelessness and negligence negate good faith; (*Au Meng Nam & Anor v. Ung Yak Chew & Ors* [2007] 4 CLJ 526; [2007] 5 MLJ 136).

**[55]** In this case, the plaintiffs have lodged a caveat on 4 October 2016. In Form 19B for the first property, the first plaintiff states *inter alia* as follows:

(i) Pada masa yang matan, saya merupakan pemilik berdaftar dan benefisial bagi tanah yang dipegang di bawah HS (D) 33355 PT 1039 Mukim Cheras Daerah Ulu Langat, Selangor dan semua bangunan yang didirikan di atas tanah tersebut (harta tersebut).

(viii) Saya amat terkejut mendapati bahawa harta tersebut telah secara penipuan telah dipindahmilik kepada Wong Ing Tong pada 2.9.2016.

(ix) Saya telah mengarahkan peguam saya untuk memulakan satu tindakan guaman untuk membatalkan pindahmilik secara fraud tersebut.

(x) Saya masih memegang surat hakmilik asal harta tersebut. Oleh yang demikian, saya ingin memasukkan suatu kaveat ke atas hartanah tersebut untuk mengekalkan hak saya kepada hartanah tersebut.

**[56]** In respect of the second property and the second plaintiff's caveat on 4 October 2016, the first plaintiff and her husband, Chong Wai Onn as directors of Hoyen Enterprise Sdn Bhd, states in Form19B *inter alia* as follows:

(i) Pada masa yang matan, Syarikat tersebut merupakan pemilik berdaftar dan benefisial hartanah yang dipegang di bawah HS (D) 33356 PT 21040 Mukim Cheras, Daerah Ulu Langat, Selangor dan semua bangunan yang didirikan di atas tanah tersebut (harta tersebut).

(viii) Saya amat terkejut mendapati bahawa harta tersebut telah secara penipuan dipindahmilik kepada Wong Ing Tong pada 8.8.2016.

(ix) Saya telah mengarahkan peguam Syarikat untuk memulakan satu tindakan guaman untuk membatalkan pindahmilik secara fraud tersebut.

(x) Syarikat tersebut masih memegang surat hakmilik asal harta tersebut.

**[57]** Maybank's lawyer for the loan documents, one Chong Tian Hock (DW7) testified that he knew about the plaintiffs' 4 October 2016 caveats. He admitted he had read the plaintiffs' Form 19B. He, therefore, knew about the allegation of fraud and the rival claim. However, he said he was not interested to know the details of the caveats or why the caveats were entered. He, nevertheless, informed Maybank about the existence of the caveats on 28 November 2016.

**[58]** It is trite law that the knowledge of fraud and rival claim on the part of the bank's solicitor was the knowledge of the bank; see *T Sivam Tharamalingam v. Public Bank Bhd* [2018] 6 CLJ 1; [2018] 5 MLJ 711.

**[59]** Based on *T Sivam*'s case, the learned HCJ ruled that Maybank had actual knowledge of the plaintiffs' caveats and the alleged fraud upon being informed by DW7. Therefore, Maybank knew of the rival claim and the alleged fraud. This fact is not denied by Maybank.

**[60]** Relying on the documentary evidence which show Wong Ing Tong was the registered proprietor of the properties and the powers of attorney were validly registered, DW7 enquired with Wong Ing Tong about the caveats. Wong Ing Tong told DW7 that he was aware of the caveats and that he can use the powers of attorney to remove the caveats. The caveats removal form was prepared by Wong Ing Tong's lawyer, the third defendant.

**[61]** The plaintiffs' caveats were removed by the land office without giving any notice to the plaintiffs.

**[62]** In concluding Maybank had not acted in good faith, the learned HCJ takes cognisance of the following facts:

(i) DW7 did not make enquiries with the plaintiffs to seek their views;

(ii) the requirement to give notice to the caveator was bypassed by using the powers of attorney when it would be reasonable to make enquiries to ascertain that the powers of attorney were genuinely executed; and

A (iii) Maybank was not concerned with the issue of fraud, why the caveats existed and how they were removed. It appears that Maybank is only concerned with getting the caveats removed.

**[63]** Before us, learned counsel for Maybank submitted that the caveats dated 4 October 2016 are merely assertions of an interest in a property by
B the caveator. It is submitted that a caveat is not a notice of fraud, but merely a notice of an adverse claim that may be asserted by anyone, *bona fides* or otherwise. Maybank relies on the Court of Appeal case of *Rabiah Lip & Ors v. Bukit Lenang Development Sdn Bhd & Other Appeals* [2008] 3 CLJ 692; [2008] 5 MLJ 128.

C **[64]** In *Rabiah*'s case, the appellants who are squatters in six plots of land (out of 407 plots purchased by the respondent developer) had lodged a private caveat in respect of the six plots, claiming each of them had paid RM3,000 to the landowner to purchase their respective plot. The High Court found there was no concluded agreement for the purchase of the six plots as
D contended by the appellants. The Court of Appeal affirmed the High Court's decision and ruled that the caveat entered by the appellants was an afterthought. We find *Rabiah*'s case does not apply because the facts and issues in that case, are totally different from the present case.

E **[65]** It was submitted that Maybank has taken sufficient reasonable steps to enquire about the caveats and Wong Ing Tong's ownership of the properties. Therefore, it was submitted that the learned HCJ placed an erroneous burden on Maybank to meet the good faith requirement.

**[66]** We disagree with learned counsel for Maybank's submission. In our
F view, a reasonable, prudent purchaser in Maybank's position would investigate as to what, why and how the plaintiffs had alleged there was a fraud. Surely, Maybank ought to take precautions to find out the truth of the matter before deciding to grant a loan to the second defendant. If Maybank conducted an investigation, it would discover that the documentary evidence
G relied upon by Maybank to effect the transfer of the properties to Wong Ing Tong were tainted with forgeries. Despite having actual knowledge of the dispute of ownership and the allegation of fraud, Maybank treated the caveats as insignificant and had them removed. Maybank then proceeded to grant a loan to the second defendant and create the charges. In the circumstances of this case, we find Maybank had not acted reasonably and fairly. Our view
H is Maybank's conduct excludes good faith. Therefore, we find the learned HCJ had not erred in making a finding that Maybank was not a purchaser in good faith.

**[67]** For the aforesaid reasons, we find no merit in the appeal. We, therefore dismissed the appeal.
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**[68]** In view of the circumstances of this case, we make no order as to costs for all three appeals.